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September 17, 2007

The Honorable Marlene H. Dortch  
Secretary  
Federal Communications Commission.  
236 Massachusetts Avenue, N.E., Suite 110  
Washington, DC 20002

Reply Comments In the matter: MB Docket No. 07-42, Development of  
Competition and Diversity in Video Programming Distribution  
and Carriage

Dear Madame Secretary:

BTNC would like to echo the comments filed by The America's Channel (TAC) and provide additional insight into the following three subjects:

- Discriminatory carriage requirements;
- Defining non-affiliated networks; and
- The relationship between discrimination and *a-la-carte*.

In addition, BTNC will rebut the comments filed by Comcast, Time Warner and NCTA.

### **Discriminatory Carriage Requirements**

The America's Channel describes two commonly-used carriage requirements imposed by MSOs on non-affiliated networks. MSOs impose these requirements on non-affiliated networks in a discriminatory fashion in order to protect their own vertically-integrated program services against competition. The first of these discriminatory carriage requirements is referred to as a "launch requirement."

A “launch requirement” is a common practice used by MSO programming executives whereby a non-affiliated network is required to launch on another distribution network before the corporate programming executive is willing to negotiate carriage on his cable systems. This requirement is never imposed on MSO-affiliated networks.

The second discriminatory carriage requirement is referred to as a “funding requirement.” A “funding requirement” obliges a non-affiliated network to demonstrate that it has enough available cash to sustain long-term operations before the MSO programming executive is willing to negotiate carriage on his cable systems. Both Comcast and Time Warner programming executives understand that, absent a distribution agreement with at least one of the two major cable MSOs, non-affiliated networks will encounter much resistance when attempting to raise start-up capital. Likewise, these same programming executives know that start-up capital is readily available to any network that has secured carriage agreements with one or both of the major cable MSOs. Again, funding requirements are never imposed on MSO-affiliated networks.

BTNC respectfully requests for the Commission to clearly articulate the following: “Any and all carriage requirements imposed by MSOs on non-affiliated networks but not equally imposed on MSO-affiliated networks are considered to be discriminatory.”

### **Defining an Independent (non-affiliated) Network**

BTNC endorses the criteria used by TAC to determine qualifications for an independent (non-affiliated) network.

#### **Independent (non-affiliated) Network Standards**

- The programmer in the aggregate is at least two-thirds owned and operated by parties not affiliated with an MVPD or broadcast company and/or its affiliates.
- The programmer’s content or programming decisions are not controlled by an MVPD or broadcast company.
- The programmer offers originally-produced programming.
- The programmer does not offer more than six (6) hours per day combined of infomercials, shopping programming and/or other programming to be determined in the rulemaking.
- The technical quality of programming satisfies all applicable industry and governmental standards.
- The programming offers redeeming social value.
- The programming is of cultural significance.
- The programming will not violate indecency and obscenity rules.
- Any other criteria established in the course of the rulemaking.

### **Relationship between Discrimination and *A-La-Carte***

As noted by TAC, today many independent networks believe that an a-la-carte mandate would adversely impact their ability to secure funding and produce programming. Absent fair market access—free of discrimination from vertically-integrated MSOs, independent networks in an *a-la-carte* environment will be denied funding in addition to carriage. Today, a network is evaluated primarily on the strength of its distribution agreements rather than its quality, content, and/or consumer demand. If this fundamental market characteristic is changed and discriminatory practices are eliminated an *a-la-carte* environment will result in greater programming choices and lower cable rates for television consumers.

BTNC believes that both the elimination of market entry barriers and the recent advancements in technology (i.e. switched digital video) will provide incentives for all Multichannel video providers to offer consumers more creative packaging options, eventually leading to an *a-la-carte* environment. TAC identified the key market force that must be addressed by the Commission when it stated in its filed comments: “Creating a freely competitive environment in which affiliation is a non-factor in the success or failure of a product could embolden investors to take risks, as they use to in the cable industry, and be willing to bet that an independent channel might succeed because it provides consumers with a better value than an affiliated channel.”

### **Correction to the Record**

BTNC would like to correct an error discovered in its original comments. BTNC represents in its original filing that Time Warner and Comcast control cable television access in 46 of the Top 50 African American markets. New estimates of the African American television markets, released in earlier this month, indicate that Time Warner and Comcast control cable television access to 44 of the Top 50 African American television markets. This new data, compiled by Nielsen, also indicates that the two premier gatekeepers control access to 87.3% of the nation’s African American television households, or 11.9 million of the 13,652,140 African American television households.

Distribution of new independent networks on Time Warner and Comcast is vital to the introduction of multicultural programming, particularly as it relates to African Americans.

### **Response to Comments Filed by Comcast, Time Warner and the NCTA**

Is it any surprise that Comcast, Time Warner and NCTA support the *status quo*? Being all-powerful by controlling access to America’s cable television households can be intoxicating, even addictive. If the precept is true that admitting one’s addiction is the first step to recovery, then clearly the comments filed by Comcast and Time Warner, as well as NCTA, indicate that the cable industry has not

begun the healing process.

The comments filed by Comcast, Time Warner and the NCTA have a common theme.

- I. [Cable industry claim...] THE PROGRAM CARRIAGE PROCEDURES ARE WORKING, despite overwhelming evidence to the contrary.
  - All seven African American owned and operated independent networks have been denied access to America's television households.
  - MSO-affiliated networks enjoy widespread linear distribution, while independent networks are denied carriage, provided limited distribution, provided unfavorable distribution terms, or ignored altogether.
  - During the last 15 years, independent programmers remain silent to the abuses of MSOs because of an ambiguous complaint process and fear of retaliation.
- II. [Cable industry claim...] THE COMMISSION SHOULD NOT IMPOSE ARBITRATION, despite the obvious need for a process that will eliminate discriminatory barriers to market entry in a timely and cost-effective manner; while at the same time protecting an independent network from MSO retaliation. Neither Comcast, Time Warner nor NCTA offer an alternative to arbitration; they simply support "*the status quo!*"

At this point in the cable industry's troubling history, it is time for regulators, lawmakers, trade representatives, and—most importantly—cable television consumers to move beyond complacency with *status quo* and toward solving this critical challenge to our democracy.

It is disappointing that neither Comcast nor Time Warner acknowledges the impact it has on society when it denies carriage to an independent (non-affiliated) network. Because Comcast and Time Warner control a statistical majority of the nation's cable households, carriage by one or both of these dominant players in the marketplace is essential in order for an independent network to secure funding, compete for advertising dollars, or simply survive long-term. Instead, both Comcast and Time Warner cast off their obligation to promote diversity in programming content for the public good to DBS and the Internet. **Remember, Comcast and Time Warner, together, control access to 11.9 million or 87.3% of our nation's African American households;** and African American consumers deserve the opportunity to view programming created by people who look like them and including people who look like them.

Comcast, to its credit, filed the following comments:

- (Comcast comments filed September 11, 2007, page 26 RE: Clarifying what constitutes a discriminatory

practice) The MSO acknowledges the Commission's position *"that ultimatum, intimidation, conduct that amounts to the exertion of pressure beyond good faith negotiations, or behavior that is tantamount to an unreasonable refusal to deal with a vendor...violates the prohibitions set forth in Section 616;"*

- (Comcast comments filed September 11, 2007, page 28, RE: Revising the complaint process) Although Comcast regrettably supports the status quo *"...Comcast agrees that more expeditious resolution of program carriage complaint proceedings would benefit all parties involved..."* and;
- (Comcast comments filed September 11, 2007, page 32, RE: Possible remedies for carriage complaint) Comcast recognized *"...if a violation were to be found, the Commission would face the difficult task of fashioning an appropriate remedy. One possible remedy would be for the Commission to require carriage of the complaining network."* Comcast elaborates further on factors the Commission should take into consideration when mandating carriage on reasonable terms.

It would appear that at least as it pertains to Comcast, the MSO, Commission and independent programmers have identified some common ground.

A recent survey gauging consumer satisfaction scored Comcast and Time Warner among the lowest in the industry, with a consumer satisfaction rating of 65% and 63%, respectively (Source: CFJ Group, July 2007). A focus on providing consumers diversity of programming, which consumers are demanding, rather than protecting the purely economic interest of the MSO's vertically-integrated investments will no doubt help satisfy consumers.

### **Censorship and the First Amendment**

The following comment is part of the filing in this NPRM proceeding by Time Warner Cable. Time Warner Cable writes: ***"By creating its own programming and exercising editorial discretion in making decisions regarding the carriage of programming created by others, an MVPD engages in speech that is protected by the First Amendment."*** Time Warner uses Machiavellian logic to twist even the farthest-reaching intent of the First Amendment. To imply that Time Warner is exercising free speech by denying others the right to speak freely is ludicrous. I prefer a saying common to the Heartland of America in matters of this kind; "your rights end where my nose begins." In other words, all programming networks—-independent or affiliated—have the same right to be treated fairly and indiscriminately. It is not the decision of one corporation whether or not America wants to hear a particular point of view.

Time Warner's comment is particularly troubling when one takes into account that this gatekeeper controls access to 14 of the Top 25 African American

television markets, one-third of the Top 100 African American markets; 6.5 million, or **48%, of our nation's African American households**. Perhaps Time Warner's comment is meant to explain why none of the seven African American owned and/or operated independent networks have been granted access to the company's cable customers.

Using the First Amendment to defend its defiance of statutory mandates [not to discriminate on the basis of affiliation or non-affiliation], Time Warner illustrates just how intoxicating it can be to view ones self as the all-powerful gatekeeper, free to censor minority ideas and viewpoints from American homes. It is time to begin the healing process.

Sincerely,

JC Watts, Jr.  
Chairman  
Black Television News Channel, LLC